(9)

No. 96-270

In the Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners

v.

GEORGE WINDSOR, ET AL.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents fail to present even one cogent reason for denying review. They do not dispute that

- The issue presented for review is exceptionally important (Pet. 2-3);

- The issue arises with great frequency throughout the federal courts, not just in mass tort cases but in class actions of all kinds (Pet. 16-19);

- There is a conflict among the courts of appeals on this significant, oft-recurring issue (Pet. 10-16) (although respondents try unsuccessfully to minimize the conflict);

- The conflict creates significant uncertainty about the viability of other class action settlements now pending in the lower courts (Pet. 17-18), and litigants and the lower courts urgently need this Court's guidance as to which of the conflicting views is right.

Despite these concessions, respondents contend that certiorari is not warranted. To an unusual degree, their arguments rely on invective and rhetorical flourishes. Their most hackneyed metaphors[1] are cumulated in an effort to prop up a contention (based on alleged extra-record statements (Windsor Op. 14 n.8)) that review should be denied because the plaintiff class has allegedly "abandoned the settlement" (White Lung Ass'n ("WLA") Op. 12), and "acquiesced in the judgment of the Third Circuit" (Windsor Op. 13), by not filing a separate petition for certiorari.

That contention should be dismissed out of hand, both as a matter of law and of fact. Rule 12.6, which automatically makes the plaintiff class a party in this Court, is a complete answer to respondents' assertion that the plaintiff class "*do[es] not appear here in any capacity*" (Windsor Op. 14 (emphasis in original). The plaintiff class will be bound by any judgment entered by this Court. And all three counsel for the plaintiff class — Gene Locks, Ronald Motley, and Joseph Rice — have asked us to inform this Court that (1) they continue to represent the class in this case and to support the settlement; (2) they believe that the Third Circuit erred in its

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[1] *E.g.*, "[i]t takes two to tango"; "defendants are flying solo"; "the sound of one hand clapping"; "flown the coop"; "the fox * * * guarding the henhouse." Windsor Op. 13, 14.

construction of Rule 23 and in rejecting the settlement; and (3) it was not necessary for class counsel to file a duplicative certiorari petition because they knew that the legal issue would be presented to this Court by the petition filed by the settling defendants.

Respondents' assorted other reasons for denying certiorari fare no better.

A. The Conflict Is Clear And Substantial.

Respondents claim that there is no "substantial" conflict with respect to the issue presented. WLA Op. 13. Their contention rests on two false bases. First, respondents mischaracterize the issue presented as whether courts *must "rel[y] exclusively* on the existence of a class settlement to satisfy Rule 23's requirements." Windsor Op. 22 (emphasis added). The issue, in fact, is whether a court *may consider* the parties' settlement in determining whether to certify the class or whether — as the Third Circuit held — a court must completely ignore the settlement.

Second, respondents persistently refuse to accept the courts' own explanations of their decisions. For example, the Fifth Circuit in *In re Asbestos Litigation*, 90 F.3d 963, 975 (1996), held that "the district court can and should look at the terms of a settlement in front of it as part of the certification inquiry." The court *expressly said* that "[m]ost circuits to decide the issue" had reached that same conclusion, citing the Second, Fourth, Eighth, and Eleventh Circuit decisions discussed in the petition (at 11-12), and that "[o]nly the Third Circuit has refused to look at settlements."[2]

Similarly, the Third Circuit itself observed that "some other courts" take the existence of a settlement into account in the class certification determination, citing the Fourth, Fifth, Ninth, and Eleventh Circuit decisions discussed in the petition (at 11-12), and it *explicitly said* that it "disagree[d] with this approach."[3]

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[2] 90 F.3d at 975 (citing *Malchman* v. *Davis*, 761 F.2d 893 (2d Cir. 1985); *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir. 1989); *White* v. *National Football League*, 41 F.3d 402 (8th Cir. 1994); *In re Dennis Greenman Secur. Litig.*, 829 F.2d 1539 (11th Cir. 1987)).

[3] *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 768, 798, 799 (3d Cir. 1995) (citing *In re A.H. Robins Co., supra; In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981); *Officers for Justice* v. *Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982); *In re Dennis Greenman Secur. Litig., supra*).

Notwithstanding these explicit statements, respondents claim that only one circuit (the Fifth) even arguably is in conflict with Third Circuit. WLA Op. 15; Windsor Op. 22. More remarkable still, the Windsor respondents claim that the Fifth Circuit somehow is the "odd man out" and the "aberrant" circuit. Windsor Op. 26.

Respondents do not even try to explain how their "analyses" can possibly trump the express, considered views of the courts of appeals. Certainly, respondents' invented distinctions among the cases do not undermine the existence or extent of the conflict.

Thus, for example, the WLA respondents (but not the Windsor respondents) attempt to distinguish *In re Asbestos Litigation* on the ground that the class there was certified under Rule 23(b)(1)(B) rather than Rule 23(b)(3). WLA Op. 16. But neither the Fifth Circuit nor the court below confined its holding to a particular type of class action. The Third Circuit held that "the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, and adequacy of representation" — requirements that apply to *all* types of class actions — because "each of these requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." Pet. App. 39a. The Fifth Circuit, for its part, stated that it was "bound" by (and agreed with) prior Circuit precedent to consider the settlement, specifically citing a case involving a Rule 23(b)(3) class. 90 F.3d at 975 (citing *In re Corrugated Container Antitrust Litig., supra*). There can be no doubt that the Fifth Circuit would have taken the settlement into account in this case.[4]

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[4] The Windsor respondents — who acknowledge the conflict between the Third and Fifth Circuits (Op. 22-23) — point to a footnote in the Fifth Circuit decision in which that court indicated that it might not uphold class certification on the facts of this case (*id.* at 23). Of course, the Fifth Circuit panel did not have the record in this case before it. In any event, that assertion is irrelevant to the issue before this Court — whether a settlement may be taken into account in determining class certification.

Respondents similarly try to distinguish *In re A.H. Robins Co.*, *supra*, noting that the class in that case was certified under Rule 23(b)(1)(A). WLA Op. 13. But the Fourth Circuit held that the class could be certified under *both* Rule 23(b)(1) and Rule 23(b)(3) (880 F.2d at 747-748) — confirming that its ruling applies to all types of class actions.

Respondents also assert that *Robins* is inapposite because it "did *not* hold that the Rule 23 criteria apply differently to a settlement class." Windsor Op. 23 (emphasis in original). As explained in the petition (at 26-27), however, our position is not that the Rule 23 criteria apply differently in the settlement context, but rather that those criteria should be applied to the case actually before the court in its current posture — taking account of the existence of the settlement — not to a hypothetical contested case that does not exist. And that is precisely what *Robins* held: "settlement should be a factor, and an important factor, to be considered when determining certification." 880 F.2d at 740.[5]

Respondents try to distinguish the Ninth Circuit's decision in *Officers for Justice* v. *Civil Serv. Comm'n*, *supra*, by claiming that it did not involve any issue regarding post-settlement class certification. WLA Op. 14-15. In fact, the Rule 23(b)(3) damages class in that case was not certified until after the settlement (688 F.2d at 622), and the court of appeals observed that the settlement was relevant to that latter decision (*id.* at 633).

In the end, this Court need not rely on the parties' arguments at all in determining the extent of the conflict. The courts of appeals themselves have explicitly recognized their disagreement. And the Judicial Conference Advisory Committee on Civil Rules -- a disinterested body that includes seven federal judges — concluded six months ago, based on its own review of the case law, that the Third Circuit's position conflicts with "the law everywhere." Reporter's Draft Minutes, p. 198; see Pet. 15-16.

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[5] This holding is not "dictum." Windsor Op. 24. The court of appeals specifically approved what "the District Court did" (880 F.2d at 740), *because* the lower court had taken the settlement into account in certifying the class, and the court of appeals followed the same approach in upholding class certification (*id.* at 742-43, 744).

B. The Judgment Below Rests Solely On The Issue Presented For Review.

Respondents concede that the court of appeals squarely held that certification of a settlement class is proper only if "the case could be litigated as a class action." WLA Op. 17. But, they say, review should be denied because of a supposed "alternative and independent" holding that disregarded that conclusion and determined that class representation was inadequate under Rule 23(a) because of the terms of the settlement itself. WLA Op. 17-18; Windsor Op. 10-12.

Respondents' argument here — like their attempt to trivialize the conflict among the circuits — rests on their refusal to accept that courts actually mean what they say.

The Third Circuit twice articulated its holding with respect to the Rule 23(a) requirement of adequacy of representation. On both occasions it *expressly said* that the basis for its decision was its holding that Rule 23 must be applied as if the case were going to be litigated.

First, summarizing its holding at the outset of its opinion (Pet. App. 19a), the court of appeals reiterated its determination in *GM Trucks* "that, for settlement classes, the 23(a) requirements must be applied as if the case were going to be litigated." In the two succeeding sentences, it extended that principle to the Rule 23(b)(3) criteria. In the very next paragraph, the court summarized its application of that principle to this case: "Examined *as a litigation class*, this case * * * cannot conceivably satisfy Rule 23," and it proceeded to discuss the Rule 23(a) adequacy of representation requirement based on that analysis. *Id.* at 19a-20a (emphasis added).

Second, the court of appeals began its detailed analysis of the certification issues by stating that the district court's error lay in "relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality *and adequacy of representation*, and the Rule 23(b)(3) requirements of predominance and superiority." Pet. App. 39a (emphasis added). The court therefore held that "this class, *considered as a litigation class*, cannot meet the 23(a) requirements of typicality *and*

adequacy of representation, nor the 23(b) requirements of predominance and superiority." *Id.* at 39a-40a (emphasis added).[6]

Having thus twice *explicitly said* that it was going to apply the adequacy of representation factor to the class "as a litigation class," the court of appeals did just that: it conducted "an inquiry into *potential* conflicts among various members of the class." Pet. App. 48a (emphasis added). The court did *not*, as respondents suggest, consider the *actual* settlement terms to decide whether class representation *actually* was adequate. To be sure, the court did note the settlement terms (Pet. App. 49a-51a), but it did so only to flesh out its holding that "[t]he lack of any *structural protections* in this case thwarted the adequate representation of the disparate groups of plaintiffs." *Id.* at 52a (emphasis added). See also *id.* at 51a (certification is flawed "[a]bsent structural protections to assure that differently situated plaintiffs negotiate for their own unique interests"). As the court explained at the outset of its opinion, this conclusion that "the amalgamation of factually and legally different plaintiffs creates problematic conflicts of interest" is a result of "[e]xamin[ing] [the class] as a litigation class." *Id.* at 19a.

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[6] Respondents "blunt[ly]" — but falsely — accuse us of "a rank fabrication" for stating that the court of appeals' adequacy analysis was conducted "'without taking into account the settlement.'" Windsor Op. 11 (quoting Pet. 29). The quoted phrase appears twice on page 29 of the petition. The first time it is correctly cited to page 39a. Respondents seize upon the second occasion — in the very next paragraph — where that citation is omitted because the reader plainly would have understood that we were repeating the very same quotation from the very same page.

Indeed, what is demonstrably untrue is *respondents'* claim — that "[t]hat language about not 'taking into account the settlement' simply does not appear on the pages cited [Pet. 48a-51a], *nor anywhere else in the Third Circuit's discussion of adequacy of representation*." Windsor Op. 11 (emphasis added). The court of appeals specifically stated on page 39a that "the district court erred by relying in significant part on the presence of the settlement to satisfy the Rule 23(a) requirements of commonality, typicality, *and adequacy of representation* * * *. But *each of these requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated*" (emphasis added).

That the Third Circuit's analysis of adequacy-of-representation was the product of its "litigation class" test is confirmed by the sharp contrast between the Third Circuit's approach here and that of courts which do take the terms of a settlement into account in ruling on adequacy of representation. Those courts hold that representation is presumptively adequate "when the court finds that the settlement is fair and adequate for the class and was negotiated at arm's length." 2 NEWBERG ON CLASS ACTIONS § 11.28, at 11-59. See Pet. 27-28.[7] The Third Circuit did not conduct such an analysis: it did not use the settlement terms to determine whether those terms *in fact* embodied a deal that was "fair and adequate" for each component of the class. Nor did it overturn the district court's extensive findings that the settlement was negotiated at "arm's length."

In short, there was no alternative, independent holding.

C. This Case Is A Particularly Suitable Vehicle For Resolving The Issue Presented.

1. Throughout their opposition briefs, respondents accuse the parties of collusion and attack the fairness of the settlement. Respondents' allegations, irrelevant to the issue before this Court, are designed to misportray the case as an inappropriate vehicle for reviewing the issue presented and to divert the Court's attention from the clear conflict and the importance of the question presented. As a matter of adjudicated fact, those allegations are also completely untrue.

The district court — lauded by the Third Circuit as "extremely able" (Pet. App. 18a) — conducted a five-week fairness hearing, preceded by extensive discovery, during which respondents advanced *all* of these accusations. The district court issued an exhaustive opinion (Pet. App. 88a-276a), including 300 factual findings (*id.* at 103a-223a), in which it rejected all of these contentions and upheld the fairness of the settlement.

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[7] The Third Circuit itself acknowledged in *GM Trucks* that other courts "have effectively relied on the settlement's terms — the outcome of the action — to find the required absence of antagonism." 55 F.3d at 798. The court expressly rejected that approach in *GM Trucks*. See *id.* at 799.

As the case comes to this Court, the district court's findings on these issues remain intact (not a single one was set aside by the court of appeals).[8] Respondents nevertheless act as if these findings do not exist and present as "facts" the very evidence that was considered and rejected by the district court. For example:

- Respondents suggest that class counsel received a bribe in the form of inflated settlements in pending cases, but the district court found that the settlement terms did not contain a premium and were just like those entered into with other plaintiffs' lawyers (compare Windsor Op. 2, 5, 21 n.13 with Pet. App. 210a-214a);

- Respondents assert that the settlement is "stingy," but the district court found that the payment terms reflect the defendants' historical average payments in tort cases (compare Windsor Op. 4-5 with Pet. App. 138a-139a);

- Respondents assert that the medical criteria are strict, but the district court found the criteria to be fair and concluded that they will award compensation to "substantially all persons with asbestos-related cancer or asbestos-related impairment" (compare Windsor Op. 4, 5 & WLA Op. 4 with Pet. App. 125a-136a).

Indeed, in one instance, respondents do not even cite the evidence they adduced in the district court, but rely on a law review article published two years later by the very professor whose testimony on the very same point the district court found "unpersuasive." Compare Windsor Op. 5 & n.3 with Pet. App. 214a (¶ 277).

2. Respondents also contend that this case is an "unsuitable vehicle" to resolve the question presented because they advanced alternative "constitutional" arguments that the court of appeals did not reach. Windsor Op. 26-30; WLA Op. 19-20. But it is often true in cases that come to this Court that the lower court has left some issues unresolved. Here, as in those other cases, this Court may decide the question presented and then either address any

[8] Respondents suggest, without citing any authority, that they somehow could not challenge the district court's Rule 23(e) fairness determination on appeal. Windsor Op. 6-7. But the same legal doctrines that allowed respondents to challenge on this appeal the district court's Rule 23(a) and (b) class certification decision would have permitted them to challenge the Rule 23(e) fairness decision as well. They simply chose not to do so.

alternative arguments for affirmance that respondents advance or leave those issues to be decided by the Third Circuit on remand.[9]

Respondents further argue that since the "constitutional" issues would remain in the case no matter how the Rule 23 issue is decided, the question presented here, unlike in "some other case," is a "sideshow." Windsor Op. 27.

Respondents have it precisely backwards. They suggest that this Court should deny review in this case and hold its breath waiting for a possible certiorari petition in *In re Asbestos Litigation*, the "other case" they have in mind. Windsor Op. 27. Although they purport to base that suggestion on this Court's institutional interests ("the Court would be well advised * * * " (*ibid.*)), counsel making the suggestion are also counsel for the would-be petitioners in *In re Asbestos Litigation*. At the same time, respondents make it clear that any such petition would raise an "entire cluster" of issues (*id.* at 26), so that the Court might never even reach the Rule 23 question.

In *this* case, by contrast, the Rule 23 question is no "sideshow"; it is the main (and only) event.

There is simply no reason for this Court to wait for some hypothetical future petition in some other case. The issue is important, the conflict is clear, and the question is squarely and cleanly presented by the instant petition. On every score — including the enormous significance of the nationwide asbestos settlement at stake here — the case at bar is an *especially* "suitable" vehicle for resolving the Rule 23 question presented.

[9] Respondents seek to paint the "constitutional" issues as insuperable barriers to ultimate approval of the settlement. But respondents' positions on those (or similar) issues were rejected by the district court in this case, the Fifth Circuit in *In re Asbestos Litigation*, *supra*, and other courts of appeals. See, *e.g.*, *Ivy* v. *Diamond Shamrock Chems. Co.*, 996 F.2d 1425 (2d Cir. 1993); *A.H. Robins*, 880 F.2d at 723-25.

Nor does the existence of these other issues make the case "interlocutory" (Cargile Op. 13) in any relevant sense. The court of appeals ordered the district court to "decertify the class" (Pet. App. 59a). If this Court denies review of the Third Circuit's decision, this case will be over and the settlement will be dead.

D. The Pending Rules Committee Proposal Is Irrelevant.

The WLA and Cargile respondents, but not the Windsor respondents, argue that the pending Advisory Committee proposal to amend Rule 23 warrants denial of certiorari. As explained in the petition, however (at 20-21), and as respondents do not dispute, the Advisory Committee has taken only the first step in a cumbersome and time-consuming process which will provide no remedy for courts and litigants that must face uncertainty, and be subjected to inconsistent legal standards, for at least several years before that process can be completed. And that process hardly assures any relief even at the end of those years — the amendment can be derailed at any stage.

Moreover, as the WLA respondents concede (Op. 21), the proposal would not fully remedy the havoc created by the decision below. The proposed new rule (if ever adopted) would alter the requirements for settlement classes only under Rule 23(b), while the Third Circuit held that settlement may not be taken into account for purposes of Rule 23(a) or (b).

Finally, respondents' counsel are actively involved in opposing the Advisory Committee's proposal. Surely they may not be heard to argue in this Court that certiorari should be denied because alternative help is on the way — when they are making every effort to sink the putative relief ship.

E. Respondents' Defense Of The Decision Below Is Both Wrong And Premature.

In light of the considerable judicial and academic authority that rejects the Third Circuit's approach (Pet. 10-16), and the support for our position in this Court's precedents and other authority (Pet. 21-30), respondents' defense of the decision below as "plainly correct" (Windsor Op. 15-22) is obvious hyperbole.

This is not the time, however, to fully debate the merits of the decision below: the only question at this juncture is whether this Court should address the merits. We submit that with respect to *that* question — in light of the importance of the issue, the clear conflict among the circuits, and the urgent need for a definitive resolution of the issue — the proper course is clear. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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